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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOY IRENE WEBB, Defendant and Appellant.	G055267 (Super. Ct. No. 15WF2780) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard J. Oberholzer, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Kevin J. Lindsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was convicted of an *Estes* second-degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c); *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.)[1] The court suspended execution of a three-year prison sentence and placed defendant on five years of formal probation.

In an *Estes* robbery, the perpetrator accomplishes a theft without the use of force or fear, but in attempting to escape uses force or fear. Often, as here, it is a case of shoplifting, and the perpetrator uses force when confronted by a loss prevention officer (LPO). Here, the LPO confronted defendant and a physical altercation occurred. Defendant's theory at trial was that she was acting in lawful defense of her purse. The jury was unpersuaded. On appeal, she contends the court erred by excluding a recording of a 911 call, which she contends would have bolstered her theory and undermined the prosecution. We conclude the court was within its discretion in excluding the call and thus affirm.

FACTS

A Kohl's LPO watched defendant put boxes of silver jewelry in her shopping cart, take the cart into a dressing room, and then emerge from the dressing room without the cart. According to the LPO's testimony, when she checked the dressing rooms, she found defendant's cart with empty silver jewelry packages in it. She followed defendant outside the store, identified herself as loss prevention, showed defendant her badge, and told defendant to come back inside. Defendant immediately responded that she did not take anything from the store and would not go back inside. Defendant kept walking and ignored the LPO.

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[1] All statutory references are to the Penal Code unless otherwise stated.

As defendant refused to cooperate, the LPO stated she would call the police. Defendant turned and tried to punch the LPO. The LPO grabbed defendant's arms to prevent her from punching or fleeing. The ruckus caused a scene, drawing the attention of passers-by, at which point defendant told them the LPO was attempting to steal her purse. Defendant then began hitting the LPO on her right arm in an apparent attempt to force the LPO to release her. When the LPO did so, defendant said, "I didn't take anything from your store so you can have my purse, whatever you're looking for."

Defendant then ran from the scene just as a police officer was pulling up. The officer followed defendant into an alley, where he found her hiding with the silver jewelry.

At trial, a witness to the struggle testified and described the event somewhat differently. The witness was working at a nearby grocery store when he noticed a struggle between the LPO and defendant. The witness testified the two were "tugging over a purse," with each woman holding on to it. The witness then saw defendant attempt to hit the LPO, and heard defendant say, "Give me my purse, bitch." The principal difference between this testimony and that of the LPO was that the LPO testified she never attempted to grab defendant's purse.

During trial, the defense proffered a recording of a 911 call made by a witness. The defense attempted to admit the recording into evidence over a hearsay objection under Evidence Code section 1240, as a spontaneous statement narrating a presence sense impression while under the stress or excitement of that perception. The transcript of the call is as follows:

"911: Police department. Can I help you?

"CP1[2]: Hi, uh, we're over at Brookhurst and Adams and there's some kind of dispute going on; ladies fighting over a purse . . . um . . . .

"911: Where is she at? What store? What corner?

"CP1: Uh, is it the H.B. Pita Grill Store, and then the other girl just took off on foot going . . . —what direction, guys? Oh, a police officer just drove by, too.

"911: Hey, they're saying . . . .

"CP1: He's going north on Brookhurst.

"911: . . . that just drove by at Brookhurst and Adams, reference this 415…okay, and I'm sorry. They are fighting about a purse?

"CP1: . . . uh, yeah. The one lady has a purse. The cops just flipped around…uh…

"911: Did you guys waive him down?

"CP1: Yeah, I can try and wave him down.

"911: Okay, and—

"CP1: Um . . . yeah, he just— . . . he just went, uh . . . .

"911: Okay—

"CP1: . . . down the alley where the girl ran. Yeah.

"911: Okay. Which way did the girl run?

"CP1: Uh . . . down the alley that the guy just went . . . the cop just went.

"911: Okay. I . . . I don't know where that—

"CP1: She's wearing a black sweatshirt . . . I-I don't know . . . but I'm there's somethin' on the back of it . . . there's . . . .

"911: Where's—

"CP1: . . . another guy chasing behind them.

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2 "CP1" refers to the complaining party.

"911: Okay. So . . . I'm sorry. What guy are you talking about? A guy on foot . . . .

"CP1: Okay—

"911: . . . chasing behind the female?

"CP1: There is, now, a guy on foot chasing behind the cop car . . . that went . . . past, too . . . and then, the other girl that was fighting with her purse, they just took off, looks like . . . I don't know if they're going to their cars, or if they're leaving.

"911: Okay. Hold on one second . . . okay, are you there? Are you . . . .

"CP1: Yeah.

"911: . . . there? Okay. I'm sorry. So, the other-the other people that were involved that did not run…

"CP1: Yeah.

"911: . . . where are they at?

"CP1: Uh . . . are those-are those other people at the car? . . . and that's the car right there? The other people. The other . . . Yes . . . I think-I think they're still here by a black car.

"911: Okay, and-and what lot would that be in?

"CP1: This is right outside the Jo-Ann Fabric.

"911: The what?

"CP1: Jo-Ann Fabric.

"911: Oh . . . so, where is that black car parked at? Is that near Jo-Ann's?

"CP1: Yeah, they're, like, right in front of it. I'm . . . I'm not sure if they're…leavin', or whatnot. Here's another police officer.

"911: Are you able to wave them down, like, the people who were involved, and tell 'em, 'hey,' you know, 'there's cops here', or did they not want contact?

"CP1: You know, I'm not sure. I-I . . . .

"911: Okay. So, you're not . . . .

"CP1: I can't…

"911; . . . involved at all?

"CP1; . . . wave 'em down. They're—

"911: You're not involved . . . .

"CP1: No, no."

The court ruled the caller's narrative satisfied neither the excited utterance requirement, as there was no stress in the caller's voice, nor the present-sense impression requirement, as it was unclear exactly what the caller was narrating. The court further ruled it was inadmissible under Evidence Code section 352 in that the witness appeared to only make a partial statement and would not be subject to cross-examination.

DISCUSSION

The sole issue on appeal is whether the court prejudicially erred by excluding the 911 recording. On appeal, defendant renews her contention that the 911 call was admissible over a hearsay objection as a spontaneous statement under Evidence Code section 1240. "Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*People v. Merriman* (2014) 60 Cal.4th 1, 65.)

Evidence Code section 1240 provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "To qualify for this exception, (1) there must have been a startling

occurrence that produced nervous excitement, thus making the statement spontaneous and unreflecting; (2) the statement must have been made before there was time to contrive and misrepresent; and (3) the statement must relate to the occurrence preceding it." (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1027.)

The difficulty defendant faces on appeal is that the court found the 911 call was not made under the influence of nervous excitement, and that finding was based on its own perception of the caller's voice in the audio recording. We do not have that recording in our record.

In an attempt to overcome that hurdle, defendant relies heavily on *People v. Poggi* (1988) 45 Cal.3d 306 (*Poggi*). There, the victim of an assault and rape was interviewed 30 minutes after the assault, at a time when she was rambling, incoherent, and bleeding from several wounds. Over the course of the interview the officer managed to calm her down and elicit inculpatory information. (*Id.* at pp. 315-316.) The court admitted the victim's statements as spontaneous statements. (*Id.* at p. 316.) On appeal, the defendant argued this was error because the victim "had been calmed down sufficiently to be able to speak coherently." (*Id.* at p. 319.) Emphasizing the breadth of the court's discretion on this issue, the court rejected defendant's argument. "[T]he fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity. [Citations.] To conclude otherwise would render the exception virtually nugatory: practically the only 'statements' able to qualify would be sounds devoid of meaning." (*Ibid.*)

Here, defendant seizes on the *Poggi* court's language that calm, coherent statements are not inconsistent with being under the stress of a perception. But the important distinction here is that the court excluded the testimony, and thus we must indulge every reasonable inference favoring that ruling. In *Poggi*, by contrast, the court had admitted the statement, and thus the *Poggi* court was required to indulge every reasonable inference favoring admission of the evidence. In view of the proper standard

of review, we cannot say the court abused its discretion in finding the 911 caller was not under stress or excitement. We do not have the audio recording of the 911 call, and thus we have no basis upon which to criticize the court's perception of the caller's voice. And there is nothing about the caller's circumstances that would *necessarily* cause stress or excitement. Some caller's might be excited under such circumstances, others not. In the absence of stress or excitement, the statement does not qualify as a spontaneous statement, and thus is inadmissible under the hearsay rule.

We also affirm the court's ruling under Evidence Code section 352, which provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The probative value of the 911 call, defendant argues, is that it support's defendant's theory that the physical altercation was over the purse, not in an attempt to flee. The danger identified by the court was that the statement appeared to be only a partial, and confusing, description of what occurred.

The court's concern was well founded. A review of the transcript reveals a muddled, partial account of what occurred. The narrative is riddled with overt expressions of confusion on the part of the caller. Moreover, there was no showing in the record that defendant could not have subpoenaed the witness to testify in court. Finally, the prejudice to defendant was minimal, as defendant called an eyewitness to testify that the defendant and LPO were struggling over defendant's purse. The 911 call was, at best, cumulative.

DISPOSITION

The judgment is affirmed.

IKOLA, ACTING P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.